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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>FIDEL SALAS PIEDRA, JR.,<br>Defendant and Appellant. | G039286<br>(Super. Ct. No. 06NF3037)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Judgment affirmed; remanded for resentencing and correction of abstract of judgment.

Anna M. Jauregui, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

THE COURT:[*]

A jury found appellant Fidel Salas Piedra, Jr., guilty of second degree robbery, commercial burglary, and misdemeanor vandalism. The court sentenced him to three years in prison for robbery, stayed the sentence for burglary, and suspended the sentence for vandalism. On appeal, he makes two arguments.

First, he asserts that the conviction for robbery must be reversed because the trial court failed to instruct the jury sua sponte on the lesser included offense of battery. He suggests that under the "accusatory pleading" test the trial court had such a duty because the information charged him with using force and fear and the evidence showed any force or fear was used for purposes of self-defense only and initiated after he no longer had possession of the stolen property. We disagree with his view of the evidence and will affirm the judgment.

Second, he argues the amount of the restitution ordered and the order "suspending" the misdemeanor vandalism conviction must be corrected. The Attorney General correctly concedes these points. We will order the trial court to make the appropriate corrections.

I

The pertinent facts are simply stated. A uniformed security guard at a Northgate Market in Anaheim observed Piedra take a six-pack of Smirnoff Ice bottles off the store shelf, place them in a zippered bag, and walk out without paying. The guard approached him in the store parking lot and asked why he had not paid. Piedra responded that he had a receipt, but when he was unable to produce one the guard told him to go back and pay. Piedra and the guard began walking towards the store. At no time did the guard ever touch or threaten him.

As they neared the store entrance, Piedra stopped and said, "I just won't

[*] Before Aronson, Acting P. J., Fybel, J., and Ikola, J.

pay." He elbowed the guard in the face and tried to flee still carrying the six-pack under his arm. The guard grabbed one of Piedra's hands and shouted for help. Piedra pushed the guard and tried to strike him as several store employees rushed to the guard's assistance. As Piedra cursed, yelled, and hit at them, one of the employees rescued the six-pack from him.

II

Piedra seeks reversal of the judgment solely on the ground that battery is a lesser included offense of robbery. He argues that because the information charged him in the conjunctive (the robbery of the guard was accomplished by means of force *and* fear) the trial court had a sua sponte duty to instruct the jury on the lesser included offense of battery, its failure to do so was structural error, and thus the judgment must be reversed.

No published case has addressed the legal question as to whether battery is a lesser included offense of robbery. Both sides agree the closest case is *People v. Wright* (1996) 52 Cal.App.4th 203, which held that assault is not a lesser included offense of robbery. Not surprisingly, and perhaps with well-grounded justification, Piedra argues *Wright* was wrongly decided: he leans heavily on the text of an unpublished opinion from a sister District to make his point, and he recognizes, surely, that this court has also questioned the validity of *Wright* in an unpublished opinion. Although our Supreme Court acknowledges the on-going legal debate as to whether assault is a lesser included offense of robbery (see, e.g., *People v. Sakarias* (2000) 22 Cal.4th 596, 622, fn. 4; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127), it has yet to weigh in on it.

We do not need to answer that question here, either. It is well settled that "a trial court must instruct the jury sua sponte on an uncharged offense that is lesser than, and included in, a greater offense with which the defendant is charged *only if there is substantial evidence that, if accepted, would absolve the defendant from guilt of the greater offense but not the lesser*." (*People v. Waidla* (2000) 22 Cal.4th 690, 737 [italics

added]; see also *People v. Garcia* (45 Cal.App.4th 1242, 1246.) We reviewed the record and find no such evidence. The evidence supports a finding of robbery: Piedra struck the guard and the other store employees while attempting to remove the property without paying for it. The evidence does not support a finding of battery: Piedra did not abandon the property before striking the guard and the others. (Cf. *People v. Pham* (1993) 15 Cal.App.4th 61, 68.) Accordingly, even if battery is a lesser included offense of robbery, here the trial court had no sua sponte duty to instruct on the lesser offense because the evidence does not absolve Piedra of the greater offense.

III

We now turn to the conceded issues. First, appellant was found guilty of damaging a police vehicle by kicking the windows and door frame while in the backseat of the vehicle. The City of Anaheim sought restitution for repair in the amount of $63.92. The sentencing minute order and the abstract of judgment transpose the cents and show a restitution order of $63.29. But at the sentencing hearing the court orally stated restitution was $63.22. The Attorney General acknowledges the trial court's oral pronouncement controls over the minute order. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.) The abstract of judgment must therefore be corrected to reflect restitution in the amount orally pronounced.

Second, the trial court suspended imposition of sentence on count three, misdemeanor vandalism of the police vehicle. Pursuant to Penal Code section 1203.1, subdivision (a) the trial court has no power to suspend sentence unless probation is granted. Here, the court found "defendant statutorily ineligible for probation. Even if the defendant were eligible for probation, the court would not be granting it here as the defendant has had many chances on probation before and has simply not succeeded." The suspended sentence is thus void. (*Oster v. Municipal Court* (1955) 45 Cal.2d 134, 139; *People v. Rickson* (1952) 112 Cal.App.2d 475, 481.) Piedra and the Attorney General dispute whether the sentence on count three may be stayed (Pen. Code, § 654) or

can only be ordered to run concurrently to the sentence on count one. Given the trial court did not impose sentence on this count we will remand the matter to the trial court for sentencing on this count.

IV

The matter is remanded to the trial court for the imposition of sentence on count three and to correct the abstract of judgment in accordance with the views expressed in this opinion. In all other respects the judgment is affirmed.